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October 1, 1984

The Honorable Edward G. Guerrero
Arizona State Representative
State Capitol, House Wing
1700 West Washington
Phoenix, Arizona 85007

Re: I84-138 (R84-073)

Dear Representative Guerrero:

This letter is in response to your inquiry concerning possible constitutional or statutory prohibitions to university merit pay plans established on a department-to-department basis. Your inquiry arises from recent legislation enacted by the 36th Legislature, Ch. 289, 1983 Ariz.Sess.Laws (1st Reg. Sess.) ("Ch. 289") which amends A.R.S. § 15-1622 by providing:

> The Arizona Board of Regents shall submit to the legislature by December 31, 1983 a comprehensive merit pay plan covering all faculty members, administrators, professionals and classified employees. Notwithstanding any other law, the comprehensive pay plan may or may not include cost-of-living increases. If the legislature takes no action on the plan, the Board shall implement it on July 1, 1984.

The practical effect of adopting a plan for compensating employees based upon merit would be that employees in the university system whose job description requires that they perform the same duties would be compensated in different amounts, based upon the quality of their performance rather than other factors. You have asked whether such a pay plan based solely upon merit complies with the Arizona and United States Constitutions and, further, whether such a plan would subject the state or its agencies to special scrutiny or liabilities. You are particularly concerned because employees with the same duties would be paid different salaries, notwithstanding the fact that those employees work in the same university department or the same university, and notwithstanding the fact that these employees are employed by the same employer, the Arizona Board of Regents. For the reasons set forth below, we conclude that any disparity in pay that is the result of a valid pay plan based solely upon merit would not violate federal or state constitutional guarantees nor subject the state or its agencies to any special scrutiny or liabilities.

Since the proposed merit pay plan would result in unequal pay increases which are determined on the basis of merit, rather than job classification, duties, or years of service, the most likely attack on Ch. 289 would be based upon the equal protection guarantees of the United States and Arizona constitutions. The Fourteenth Amendment to the United States Constitution prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws." Arizona's Constitution has a similar equal protection clause which provides "no laws shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Ariz.Const., art. 2, § 13. We believe that a valid merit pay plan would not violate either provision.

The equal protection guarantee of the Fourteenth Amendment is designed to protect against legislation that results in unequal treatment because of legislatively created classifications. The United States Supreme Court has adopted a two-tier test for scrutinizing a particular classification. When the classification interferes with a "fundamental

right"[1] or operates to the particular disadvantage of a suspect class,[2] the classification will be closely scrutinized in light of its asserted purposes. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). To withstand a strict scrutiny test, a state must show a compelling governmental interest in the classification. Eisenstadt v. Baird, 405 U.S. 438 (1972); Korematsu v. United States, 323 U.S. 214 (1944).

When a "fundamental interest" or "suspect classification" is not involved, the courts adopt a much less rigid test of "mere rationality." This test requires only that the classification adopted by the state be rationally related to a legitimate state concern. Trimble v. Gordon, 430 U.S. 762 (1977).

Under the mere rationality test, legislation that affects certain classes of persons differently is not required to precisely fit the intended purposes for which it was enacted. As the United States Supreme Court has pointed out, a state does not commit a fatal flaw simply because it might have constructed the statute so as to further its goals "more artfully, more directly, or more completely." Hughes v. Alexandria Scrap Corporation, 426 U.S. 794, 813 (1976). The Court made this statement:

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1. For instance, the right to vote, Bullock v. Carter, 405 U.S. 134 (1972); the right of interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); rights guaranteed by the First Amendment, Williams v. Rhodes, 393 U.S. 23 (1968); the right to procreate, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

2. For instance, alienage, Graham v. Richardson, 403 U.S. 365 (1971); race, Brown v. Board of Education, 347 U.S. 483 (1954); McLaughlin v. Florida, 379 U.S. 184 (1964); and ancestry, Oyama v. California, 332 U.S. 633 (1948).

> A statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it.

Id. at 813.

The Supreme Court has stated that a right of governmental employment does not qualify as a fundamental right. Murgia at 313. Therefore, classifications which are based upon economic regulation are tested under the "mere rationality" standard. Dandridge v. Williams, 397 U.S. 471 (1970). Indeed, the Supreme Court has stated that purely economic matters merit only the mildest review under the Fourteenth Amendment. Craig v. Boren, 429 U.S. 190 (1976).

For purposes of this discussion, we assume that the merit pay plan to be adopted by the Arizona Board of Regents will not base its differential pay upon a "suspect classification" nor does it affect a "fundamental right." Thus, such a plan would be subject only to the "mere rationality" test. Under this test, merit pay plans have not been found to violate equal protection. For instance, in Ballard v. Blount, 581 F. Supp. 160 (N.D. Ga. 1983), the court upheld a university merit pay plan on the grounds that it was substantially related to a legitimate and important objective, to all such plans - namely to reward acceptable teaching performance.

In Wisconsin National Organization for Women v. State of Wisconsin, 417 F. Supp. 978 (D.C. Wis. 1976), a system of differing merit pay plans for various types of state employees was found to be constitutionally permissible. The court stated:

> Just as the state may legitimately decide to pay employees a different rate depending on the skills and training involved in their jobs, it may also legitimately decide to recognize meritorious performance at different rates depending on the nature of the job performed.

417 F. Supp. at 986.

Similarly, a state university's action in conferring tenure on some professors, but not others, could not support a claim of equal protection violation. McElearney v. University of Illinois, 612 F.2d 285 (7th Cir. 1979).

Arizona courts also adopt this two-tier test to determine whether legislation violates Art. 2, § 4 of the Arizona Constitution. See Arizona Downs v. Arizona Horsemen's Foundation, 130 Ariz. 550, 637 P.2d 1053 (1981); Stephens v. Textron, Inc., 127 Ariz. 227, 619 P.2d 736 (1980). Although there are no reported decisions involving merit pay plans and Arizona's equal protection clause, we think that if a "mere rationality" test is used to examine such plans results would parallel those reached in the federal courts. Our view is supported by Arizona cases involving legislative classifications and constitutional concerns. For example, in Lewis v. Tucson School District No. 1, 23 Ariz. App. 154, 531 P.2d 199 (1975), cert. denied 423 U.S. 864 (1975), legislative distinctions between primary and secondary school teachers and other state employees, including college teachers, created by different mandatory retirement ages were held not to be irrational for equal protection purposes. The court stated as follows:

> The fact that the Legislature made a distinction between the retirement age for primary and secondary school teachers and the retirement age for other state employees, including college teachers, is not an irrational distinction. The Legislature apparently concluded that after age 65 a teacher's ability to manage and control large groups of young people would be lessened and concomitantly be an undue strain upon the teacher. While in individual cases this might not be so, we cannot say that the Legislature's recognition of the aging process by adoption of age 65 was arbitrary and unrelated to a legitimate state interest, i.e., education.

Id. at 159.

Likewise, in Edwards v. Alhambra Elementary School District, 15 Ariz. App. 293, 488 P.2d 498 (1971), the Arizona Court of Appeals determined that a school district's practice of distinguishing between teachers and non-teachers for purposes of payroll deductions did not violate the equal protection clauses of the Arizona and United States Constitutions. The court first noted that "the classification for purposes of constitutional and equal treatment between the classes must be founded on reason." Id. The court found that reason as follows:

> To make clear that insofar as teachers are concerned, they occupy a unique status in the public education of our youth, we need only point out the very existence and purpose of a school district depends upon the employment of qualified and dedicated teachers together with the necessity to compete with other school districts for such personnel . . . . One of the inducements which in our opinion could be held out to teachers and withheld from non-teachers, is the privilege of payroll deductions . . . . We therefore hold, that in the first instance, the board of trustees could, by contracts of employment, legally grant as a condition of employment, the right to teachers to have payroll deductions for whatever purposes they may desire and could legally, by contracts of employment, withhold the same privilege from non-teachers as a condition of their employment.

Id. at 296.

Applying the "mere rationality" test to A.R.S. § 15-1622 as amended, we must look to the purpose of the legislation which was to reward all classes of personnel for outstanding performance in order to encourage others to perform to their full capacity. See House of Representatives Committee on Education Report, 36th Leg., 1st Reg. Sess., 2 (March 29, 1983) (statement of Dr. Gary Munsinger, Senior Vice President,

University of Arizona). In our opinion, a merit pay plan which is based solely upon merit satisfies the requirement of the "mere rationality" test.

Ch. 289 may also be tested under the due process clause[3/] of the Fourteenth Amendment to the United States Constitution and art. 2, § 4 of the Arizona Constitution. However, due process guarantees come into play only when a protected property or liberty interest exists. Board of Regents v. Roth, 408 U.S. 564 (1972); Kanter v. Community Consolidated School District 65, 558 F. Supp. 890 (N.D. Ill., E.D. 1982). The United States Supreme Court has defined the type of property interests that come within the ambit of due process protection as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Board of Regents v. Roth at 577. In Roth, an assistant professor hired for a fixed term of one-year at a state university had no protectable property interest in employment at the university past the one-year period. In some situations, the property interest may arise from surrounding circumstances and reasonably assumed expectations. Perry v. Sinderman, 408 U.S. 593 (1972). However, courts have uniformly refused to find a protected property interest in an increased salary.

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3. Throughout this discussion of due process guarantees, we will confine our discussion to substantive rather than procedural due process since we do not have details of the particular plan which will be utilized other than the fact that pay raises will be determined on merit. Therefore, we reach no conclusions about possible procedural due process problems.

In Kanter v. Community Consolidated School District 65, a tenured public school teacher challenged a merit pay increase system based upon the due process clause of the Fourteenth Amendment. In particular, Kanter, the teacher, alleged that her procedural and substantive due process rights were denied in the establishment of written standards defining "meritorious achievement." Kanter alleged an entitlement to a merit increase system via the school district's "track movement" system. The court acknowledged that a protected property interest may exist in a teacher's tenured status. However, citing Roth, the court stated "this entitlement . . . does not extend to merit increases. . . . Rather, these increases are in most cases purely discretionary." Id. at 892.

Likewise, in Williams v. Plainfield Board of Education, 176 N.J. Super, 154, 422 A.2d 461 (1980), a teacher who was transferred was found to have no vested right in future increases in salary. The court reached this conclusion, despite the fact that the applicable statutory scheme was intended to give principals and teachers "a measure of security in the ranks that they hold after years of service." Id. at 466. See also, Muller v. Stromberg, 427 S.2d 266 (Miss. 1983), in which the court held that no legitimate property interest lies in discretionary merit salary increases even if an employee fulfills yearly objectives laid down by his employer.

In Traval v. United States, 624 F.2d 1035 (Ct. Cl. 1980), the court considered a claim by an internal revenue service employee for a higher salary which he alleged that he had been promised. The court held that, in view of all the special circumstances of the particular case, the repeal of certain regulations which would have granted him this higher salary could not prevent the employee from receiving the higher salary as promised. However, the court cautioned that its conclusion was based on the particular circumstances of the case and pointed out that "unless a statute or regulation provides otherwise, a government employee ordinarily has no vested right in his existing salary and other emoluments and conditions of employment." Id. at 1040.

We assume that any due process claim would be to the cost of living increase granted to state employees which, by enactment of amendments to A.R.S. § 15-626, the legislature has allowed to be included in merit pay increases. Thus, an

employee would not necessarily receive a cost-of-living increase rather, any monies appropriated to represent the cost-of-living increases could be converted into funds for merit pay increases instead. However, for the foregoing reasons, we conclude that the due process protections afforded by the United States and Arizona Constitutions do not apply since the employee has no property interest in a salary increase.

You have also asked whether the proposed system of compensating employees based upon merit violates any other laws or constitutional provisions or subjects the state or its agencies to special scrutiny. Assuming that this plan is based solely on merit, we find no existing Arizona laws which conflict with the amendments to A.R.S. § 15-1622 enacted by Ch. 289.

Sincerely,

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